

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:F:BOS:POSTF-158329-01

BJLaterman

date:

5/9/02

to:

[REDACTED]
LMSB Team Manager
LMSB:HMT:[REDACTED]

att:

[REDACTED], Team Coordinator

from:

Associate Area Counsel, Boston
CC:LMSB:FS:Boston

In re:

[REDACTED] Corporation ([REDACTED] L.P.)

Forms 872

Taxable Year [REDACTED]

Statute Expires: [REDACTED]

This is in response to your request dated December 19, 2001, that we give advice regarding extending the [REDACTED] statute of limitations for the partnership [REDACTED] L.P. which was included in the [REDACTED] consolidated return of [REDACTED] Corporation through two second tier subsidiary corporations. The statute of limitations for [REDACTED] L.P. for the [REDACTED] taxable year expires on [REDACTED]. This memorandum should not be cited as precedent.

[REDACTED] Corporation, a Delaware corporation, is the common parent of a consolidated group. [REDACTED] Corporation is a Delaware corporation more than [REDACTED]% of whose stock was owned by [REDACTED] Corporation. [REDACTED] is a publicly traded entity which elected to be included in the [REDACTED] through [REDACTED] consolidated income tax returns of [REDACTED] Corporation.

[REDACTED] L.P. is a partnership which was formed on [REDACTED] to develop, construct and operate a [REDACTED] plant to be located near [REDACTED]. The partners were [REDACTED] Inc., [REDACTED] Inc. and [REDACTED] Inc., Inc. [REDACTED] Inc. and [REDACTED] Inc. are wholly owned subsidiaries of [REDACTED] Corporation while [REDACTED] Inc., a [REDACTED] corporation, was a wholly owned subsidiary of [REDACTED], a Delaware corporation. [REDACTED] Corporation through its two subsidiaries had a [REDACTED]% interest in the partnership while the remaining [REDACTED]% was owned by [REDACTED].

Inc. In [REDACTED], [REDACTED] Inc., sold its partnership interest to [REDACTED], Inc. and [REDACTED] Inc.

[REDACTED] L.P. filed its first partnership tax return for the taxable year [REDACTED]. It also filed a partnership return for the taxable year [REDACTED] and filed a final return for the taxable year [REDACTED]. The partnership filed as a TEFRA partnership for said taxable years and [REDACTED] Inc. was designated as the TMP on the partnership tax returns.

On [REDACTED], [REDACTED] Corporation entered into a "Stock Purchase Agreement" with [REDACTED] LLC for the sale of its [REDACTED] Corporation stock. Certain assets and liabilities of [REDACTED] Corporation were excluded from said agreement including the stock of [REDACTED] Inc. and [REDACTED] Inc. On or about [REDACTED], [REDACTED] Corporation transferred the stock of [REDACTED] Inc. and [REDACTED] Inc. to [REDACTED] Corporation. You are seeking to extend the [REDACTED] statute for [REDACTED] L.P.

I.R.C. §6229(b)(1) provides that for TEFRA partnerships the statute of limitations attributable to the assessment of tax attributable to partnership items may be extended as to all partners by agreement between the IRS and the Tax Matters Partner. In the case of a partnership tax year ending after August 5, 1997, the TEFRA audit provisions do not apply (unless the partnership elects to have them apply) to a partnership consisting of 10 or fewer partners each of whom is: (1) a natural person other than a nonresident alien; (2) a C corporation; or (3) an estate of a deceased partner. I.R.C. §6231(a)(1)(B)(i). An election has not been made for [REDACTED] L.P., a partnership of [REDACTED] partners. Therefore, the time for assessment of a deficiency against the partners of [REDACTED] L.P. (based on pass-through items) runs from the filing of each partner's return. Thus, extensions must be secured from each partner of [REDACTED] L.P. You have indicated that you wish to extend the statute for [REDACTED] Inc. and [REDACTED] Inc. (i.e., holders of a [REDACTED]% interest in the partnership). Said corporations filed as members of the [REDACTED] Corporation and Subsidiaries consolidated group's federal income tax return.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas.

Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Furthermore, the provisions of Treas. Reg. § 1.1502-77(a) shall apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time.

Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect to the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary, which was a member of the consolidated group during any part of the consolidated return year, is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

In this case, the [REDACTED] common parent, [REDACTED] Corporation, is still in existence and, therefore, it is still the agent for the consolidated group in existence in [REDACTED] under the provisions of Treas. Reg. § 1.1502-77(a). You have already obtained an extension from [REDACTED] Corporation which extends the statute for all members of the consolidated group's [REDACTED] taxable year to September 30, [REDACTED]. Based on the facts provided, we conclude that this Form 872 executed by a current officer of [REDACTED] Corporation, the still existing parent of the group for the [REDACTED] taxable year, will extend the period for assessment of tax for [REDACTED] (for [REDACTED] Inc. and [REDACTED] Inc.) attributable to pass through items from [REDACTED] L.P.

With regard to future extensions we recommend that the caption on the Form 872 should continue to be: [REDACTED] Corporation and Subsidiaries.* However, at the bottom of the page you should add:* [REDACTED] Corporation has executed the Form 872 as agent for the [REDACTED] Corporation and Subsidiaries consolidated group for its [REDACTED] taxable year.

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual (IRM). Specifically, IRM 121.2.22.3 requires use of Letter 907 (DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires use of Letter 929 (DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the authorized manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM

121.2.22.3. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that §3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. §6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy the requirement, Publication 1035, "Extending the Tax Assessment Period," must be given when you solicit the statute extension.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If we can be of any further assistance, the undersigned can be reached at (617) 565-7855.

BARRY J. LATERMAN
Special Litigation Assistant